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MEDIATION – THE OFTEN-MISSED OPPORTUNITY!

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ABSTRACT

Parties have the opportunity to regulate the dispute, and during mediation, an acceptable solution for the dispute resolution can be seen, which will strengthen the personal or business relationship between the parties in the future. One of the key functions of a mediator to successfully mediate business disputes is to focus on the interests of the parties and be able to separate them from the positions of the parties. International mediation is seen as the amicable process of the resolution of cross-border commercial disputes, which helps parties to preserve commercial relationships. The mediator should individually analyze every case before a mediation meeting is planned. The mediator should decide whether to start with a general joint meeting or conduct individual meetings. The above-mentioned has a great impact on future processes and results. The implementation of general mediation standards in national law is a big challenge. Standards on applying enforcement and refusal mechanisms in International business disputes are general, vague, and more evaluative. States should work on the development of national guidelines and case law regarding the evaluation process of mediation by court. Digital assets from Blockchain Technology can be inherited, and because of the specificities (different territories, internet space, and different tech companies) of currency, disputes may arise in transacting inheritance. It is debatable why the Singapore Convention should not apply to settlement agreements raised from cryptocurrency.

INTRODUCTION

First, I want to mention the prehistory of mediation in Georgia and, afterwards, the existing Normative Regulation of the mediation process in Georgia regarding the Singapore Convention, which is essential for international business disputes. Also, the article will mention the essential ingredients for a successful mediation process.

When we mention introducing and establishing a culture of mediation in Georgia, the role of Ilia Chavchavadze in 19 century is essential in creating a modern concept of a mediator – a conciliator. First of all, Ilia Chavchavadze connects the need for conciliation judges in modern language with the development of life, globalization and capitalization (the relationship between people, which is related to giving and receiving), the alternative of unloading the justice system, economic existence, and, finally, it is related to resolving the disputed issue quickly and easily.¹

Of course, the modernist and eclectic world adds to mediation new functionalities, renews, and prepares for new challenges.² The parties become the main participants in the process, trying to find out what their main interests are, so mediation is based on the interests of the parties and not on their rights.³ Covid 19 Pandemic showed the world of business how it is essential to have efficient and flexible tools for resolving disputes by non-traditional and out of court way, but with enforceable document and executable result.

In collective disputes, the right of the Minister of Labor, Health and Social Affairs to receive a report from a mediator comes in collision with the requirement of the normative act to the mediator to keep confidential all information entrusted to him during the mediation process. In my opinion, in the future, it would be better to add another paragraph to Article 63 of the Labor Code of Georgia, which will clearly define what kind of information/report the mediator is obliged to provide to

the Minister of Labor, Health, and Social Affairs.⁴ It should also be considered to what extent the information obtained during the mediation process should be reflected in the report, so as not to violate the principle of confidentiality.⁵ The rules which regulate collective disputes is noteworthy for private sector.

For parties, one of the attractions of mediating business disputes is the principle of confidentiality. However, mediation does not enjoy absolute confidentiality protection, and there are legitimate grounds for breach of confidentiality. According to the general rule, information can be disclosed only in the amount and proportion necessary to achieve a legitimate aim pursued, and at the same time, in the process of disclosure, it is better to observe the principle of proportionality. The obligation to disclose information to an adequate and proportionate extent should also be respected, and the legislation requires maximum protection of the disclosed information from third parties.

1. BUSINESS DISPUTES

Maintaining business relationships is one of the major benefits of the mediation process. It does not matter what kind of the result the mediation will be completed, as the dispute will remain psycho-emotionally relaxed and in addition the disputing parties will already be informed of the real causes of the dispute. On the contrary to this advantage, we can even consider the phenomenon of the insincere⁶ party.⁷ Negotiations in the mediation format are completely based on the principle of voluntariness, which means that initiation and participation in mediation depends on the opinion of the parties, while the content and purpose of the negotiations

1 Batiashvili, I. (2022). The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), pp. 25-38, <<https://doi.org/10.60131/adr.1.2022.6162>>

2 *Ibid.*

3 Bichia M. (2021). The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, N3, p. 12.

4 Batiashvili, I. (2022). The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), pp. 25-38, <<https://doi.org/10.60131/adr.1.2022.6162>>

5 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116, <<https://doi.org/10.36475/8.1.6>>

6 Party not acting in good faith.

7 Batiashvili, I. (2022). The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), pp. 25-38, <<https://doi.org/10.60131/adr.1.2022.6162>>

are determined by the parties and the mediation process is completed by their decision.⁸

It should be noted that from December 10, 2021, 422 cases were transferred to the Mediation Center of the Tbilisi City Court. According to the statistics of 2021, there are 28 legal disputes related to business disputes; Labor Law – 27 disputes; Also, 33 current loan and microfinance disputes are recorded in the mediation center.⁹ The settlement rate is 60-70%, and disputes arising from microfinance, labor, commercial, and family relations have particularly successful results.¹⁰

According to commercialization, it has been suggested that in the focus of the broader concept of privacy, personal data may be considered part of property rights, which increases the probability that this data will be more effectively protected.¹¹ From this point of view, we can conclude that the personal information obtained during the mediation process enjoys maximum protection, and also it can be seen in the context of property rights, moreover, in conditions of the individual characteristics¹² of business relations.

Recommendations for successful completion of business mediation are: A) Creativity of the mediation process.¹³ For example, the invitation of experts in the presence of the parties. This can support building trust; B) to have fun in the mediation process. The mediation process is mostly tense, and emotional background prevails, especially tiring when this process takes hours. Therefore, a little humor and laughter will help the mediation process; C) Patience, listening carefully to the problems of the disputing parties. The glacial pace of offer and demand can be frustrating and can lead to a worsening of the situation, so it is best when the parties continue a productive discussion; D) re-

8 Kandashvili I. (2023). Negotiation and representation in mediation, house of publication Cezanne, p. 156.

9 Tbilisi City Court, N2-4118 / 4363203, 13/12/2021.

10 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116.

11 Bichia M. (2021). The danger of the privacy “disappearance” during a pandemic in the context of globalization and the grounds for its legitimacy: an institutional analysis. Globalization and Business, 6(11), p 45.

12 Peculiarities.

13 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116, <<https://doi.org/10.36475/8.1.6>>

alistic evaluation of the case and flexibility – For example, parties should sit on each other chairs (not in direct meaning). They should try to see picture form the different corner. Mediators can use the mirror effect. During the whole process parties should think about the best outcome, acceptable outcome and absolutely non acceptable outcome. At last, progress can be made when the parties understand that an intersection point exists; E) mediation is not a trial. Subject to the variances due to case complexity, very little is gained, and much might be lost than would be possible through court. The goal of mediation is to reach a compromise, not establish victory.¹⁴ F) Design a process that works for your client. In multi-party business disputes, it may be essential that the process be segmented. It is necessary to listen to all parties separately if the emotional background prevails; G) The mediator should individually analyze every case before a mediation meeting is planned. This includes case information, emotional background, predicted sensitive issues, the roots of the problem, and the main aspects of the dispute. Afterwards, the mediator should decide whether to start with a general joint meeting or conduct individual meetings. The above-mentioned has a great impact on future processes and results. (This recommendation might be very useful for the mediation process in labor disputes). H) Identification of goals – The mediator should be able to assist the party representative or the party itself in planning a wide range of settlement options and finding ways to resolve them, as well as in determining the predicted outcomes of the mediation process.¹⁵

2. INTERNATIONAL AGREEMENTS AND GEORGIA

2.1 The Singapore Convention on Mediation

The United Nations Commission on International Trade Law (UNCITRAL) was established for the facilitation of international trade, as well as

14 Ibid.

15 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116. (Holzberg R. (2013), 10 tips for a successful mediation, Connecticut law tribune, Pullman&Comley, 1-4).

to modernize and unify it.¹⁶ UNCITRAL plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.¹⁷ In 2018, the UN General Assembly adopted a resolution emphasizing the importance of mediation.¹⁸ The UN Assembly Resolution on the Model Law mentions the benefits of mediation, which are related to the unloading of justice system, the elimination of tensions, and the chance to continue commercial relations as opposed to litigation. Under Paragraph 3 of Article 1 of Model law on international commercial conciliation, the conciliator assists the disputing parties in settling the dispute amicably, although the conciliator does not have the authority to impose upon the parties a solution to the dispute.¹⁹ Articles 8 and 9 of the Model Law are noteworthy.²⁰ Article 8 regulates the disclosure of information provided specifically by a party, according to which when the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party

16 Tsuladze A. (2017). Comparative Analysis of Georgian Judicial Mediation, Tb., Publishing World of Lawyers, pp. 51-52.

17 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116. (United Nations Office at Vienna, A guide to UNCITRAL (basic facts about the United Nations Commission on International Trade Law), English, Publishing and Library Section, January 2013.

18 United Nations General Assembly, Resolution on Model law on international commercial mediation and international settlement agreements resulting from mediation of the united nations commission on international law, Seventy-third session, Distr: General, 3 January 2019, A/RES/73/199.

19 United Nations, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002, New York, 2004, United Nations Publication, Sales No. E.05.V.4, ISBN 92-1-133730-5.

20 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, 8(21), pp. 76-116, <<https://doi.org/10.36475/8.1.6>>

to the conciliation.²¹ Article 9 regulates the issue of privacy in general.²²

The Singapore Convention on Mediation (also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation) is a new multilateral treaty developed by the U.N. Commission on International Trade Law (UNCITRAL) which was open for signatures from August 7, 2019.²³ "The primary goal of the Convention is to promote the use of mediation for the resolution of cross-border commercial disputes, as mediation is seen as not only a faster, less expensive form of dispute resolution but also as more likely to preserve commercial relationships. The lack of a cross-border mechanism for giving legal effect to mediated settlement agreements is said to be a significant barrier to the willingness of some companies to use mediation; a significant amount of time and energy might be needed to reach an agreement, and if the other party later fails to perform, the company seeking compliance would essentially have to start over in litigation or arbitration".²⁴

United Nations Convention on International Settlement Agreements Resulting from Mediation lacks international legitimacy that was granted to arbitration by the New York Convention.²⁵

Also establishment of mediation in the field of cryptocurrency and blockchain technology subparagraphs (a) and (b) of paragraph 2 of the Singapore Convention can be seen as an artificial and negative obstacle. According to Convention:

"This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions

21 Resolution of United Nations General Assembly, Model law on international commercial conciliation of the united nations commission on international trade law, Annex model law on international commercial conciliation of the united nations commission on international trade law, fifty-seventh session, distr: General, 24 January 2003, A/RES/57/18, Article 6. <<https://undocs.org/A/RES/57/18>>, [28.11.2021].

22 Batiashvili I. (2022). Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, N8, pp. 76-116.

23 Schnabel, T. (2019). The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements. Pepperdine Dispute Resolution Law Journal, 19(1), p. 1.

24 *Ibid*, p. 2.

25 *Ibid*, p. 3.

engaged in by one of the parties (a consumer) for personal, family

or household purposes;

(b) Relating to family, inheritance or employment law".

Digital assets from Blockchain Technology can be inherited, and because of the specificities of currency, disputes may arise in transacting inheritance. It is debatable why mediation cannot be introduced in this part if Blockchain Technology and cryptocurrency can be seen as nontraditional tools of business relations in the 21st century.

2.2 Recognition and Enforcement of International Mediation Settlement Agreements in Georgia

Now, about ratification of the Singapore Convention in Georgia. The Singapore Convention was approved by the United Nations General Assembly Resolution N73/198 on December 20, 2018. Georgia has signed the Convention and recognized it as binding, as it will contribute to the expansion and development of mediation as an alternative dispute resolution mechanism in Georgia. In addition, Georgia will become a party to settlement agreements and Participant in the Unified International Instrument on Use and Enforcement. Georgia was one of the first countries to join the Convention. On 7 August (2019) 46 countries signed the Convention together. For the democratic development and economic growth of the country, the state must take care of the issues of the rule of law and a fair court, and along with this, the importance of alternative dispute-resolution mechanisms is highlighted.

After the signing of the Singapore Convention by the Minister of Justice of Georgia in 2019, a period of harmonizing Georgia's legislation for ratification started. In Georgia, the Convention came into force from the 2020 year. I will mention some of the changes made to the Law of Georgia on mediation and the Civil Procedure Code of Georgia.

In both laws, we have a new term: International mediation.

Present time by Article 38 of the Civil Procedure Code State fees shall be applied to an application

for a measure to secure the mediation settlement agreement, an application for enforcing the mediation settlement agreement, or an application for recognising and enforcing the international mediation settlement agreement. Article 39 declares state fees amount to GEL 150 for an application for executing the mediation settlement agreement or for recognising and executing the international mediation agreement.

In 2021, changes to the Civil Procedure Code of Georgia and Section 7⁹ were added, which defined the participation of the Court in the Recognition and Enforcement of International Mediation Settlement Agreements Concluded in accordance with the United Nations Convention of 7 August 2019 on International Settlement Agreements Resulting from Mediation. In this section, international mediation is defined as a process, however, named or referred to, which takes place outside Georgia and whereby two or more parties to a dispute attempt to reach an agreement on the settlement of their dispute with the assistance of a foreign mediator. The Court that is empowered to recognize and enforce international mediation settlement agreements shall be the Supreme Court of Georgia. One or both parties to an international mediation settlement agreement may apply to the Court with an application for the recognition and enforcement of an international mediation settlement agreement. A party to an international mediation settlement agreement submitting a request to recognize and enforce the international mediation settlement agreement as provided for by paragraph 1 of this article shall submit the court relevant documents. The types of document are written in Article 363^{23,26}.

The Court shall check the completeness of documents submitted in accordance with Article 363²³⁽³⁾ of this Code within five days after the receipt of an application for the recognition and enforcement of an international mediation settlement agreement. The Court shall establish/point to the deficiency, the correction of which is necessary for the completeness of the said documents, and shall give an applicant reasonable time to correct it. The Court shall leave the application unheard if the deficiency is not corrected within the set time limits.

26 Civil Procedure Code of Georgia, 14/11/1997, 1106, Book 79, Section XLIV16.

The Court shall decide on the recognition and enforcement of an international mediation settlement agreement in the form of a ruling. A writ of execution shall be handed over to a party to an international mediation settlement agreement along with the ruling. A ruling recognizing and enforcing an international mediation settlement agreement shall be final and may not be appealed. International mediation settlement agreements shall be enforced in accordance with the Law of Georgia on Enforcement Proceedings.

According to the Law of Georgia on Enforcement Proceedings, Article 91 – Enforcement of foreign court judgements: a decision recognized in the territory of Georgia, as provided by the legislation of Georgia, in accordance with international private law and the mutual legal assistance treaties between states, and the writ of execution copied out by a Georgian court of appropriate jurisdiction shall be forwarded for enforcement to the National Bureau of Enforcement through the Ministry of Justice of Georgia.

Finally, I will briefly review the amendments made to the Law on Mediation.

Article 13¹ regulates Recognition and enforcement of international mediation settlements, which states:

1. With the agreement of the parties to the international mediation settlement, it can be recognized and enforced by the court. The court with the authority to recognize and enforce international mediation settlements is the Supreme Court of Georgia.
2. The Supreme Court of Georgia considers the issue of recognition and enforcement of international mediation settlement in accordance with the rules established by this law and the Civil Procedure Code of Georgia.

Article 13² regulate International mediation settlement, which is not subject to recognition and enforcement. I will mention some of situation by which an international mediation settlement is not subject to recognition and enforcement. These are:

- Mediation settlement which is concluded for the settlement of a dispute arising from a transaction concluded by one of the parties to an international mediation settlement (the consumer) for personal, family or household purposes;

- Mediation settlement which has been published by a court or entered into in a pending court proceeding and is enforceable as a judgment in the State of the court issuing the judgment;
- Mediation settlement which was signed and subject to enforcement as an arbitration award.
- Also it is essential that The rules of recognition and enforcement of the mediation settlement are applied only within the limits agreed upon by the parties to the international mediation settlement.
- Reservation – Also Noteworthy that The rules for the recognition and enforcement of international mediation settlements established by the Law on Mediation and the Civil Procedure Code of Georgia are not applicable to those international mediation settlements, one of the parties of which is the state or any state agency or any person acting on behalf of this state agency.

The old version of the law of Georgia “On Mediation”, as well as the Code of Civil Procedure of Georgia, provided for mechanisms for the enforcement of mediation settlements reached as a result of mediation, however, it did not include the enforcement of international agreements reached as a result of mediation, to which the Convention appeals. Thus, after the implementation of the legislative changes, the concept of “international mediation settlement” and the rules for its recognition and enforcement appear in the legislation, as well as a list of circumstances in which the international mediation settlement is not subject to recognition and enforcement.

But What is difference between Article 363⁴⁵ of Civil Procedure Code of Georgia and Article 5 of the Singapore Convention regarding refusal of granting?

The wording of Article 363⁴⁵ of Civil Procedure Code of Georgia is different from Paragraph 2 of Article 5 of the Singapore Convention regarding refusal of granting relief.

Article 5 (2) Singapore Convention States that the courts may also *sua sponte* refuse to grant the requested relief if they find that:

- (a) Doing so “would be contrary to the public policy” of that State; or

(b) “*The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.*

Convention mentions *lex fori* as a ground for ineffectiveness.

Contrary to this, in Georgia Article 363²⁵ of Civil Procedure Code of Georgia refers to situations mentioned in subparagraphs when court has power to refuse enforcement of international mediation settlement agreements and also Code notes a general rule/standard on the refusal of the satisfaction of the motion for recognition and enforcement of the international mediation settlement. It does not explain what it means through wording: “According to the legislation of Georgia, the dispute cannot be resolved through mediation”.

Finally, I will mention that The European Court of Justice has granted the legal right to legal protection the status of a general principle of European Community law, and this principle is enshrined in Article 47 of The Charter of Fundamental Rights of the European Union.²⁷

The development of mediation within the EU operates on the background of the following legal principles: access to justice for all is a fundamental right enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; The legal right to legal protection is enshrined in Article 47 of the EU Charter of Fundamental Rights. As for the national legislation of Georgia, Article 31 of the Constitution of Georgia regulates procedural rights, according to which the possibility to appeal to the court and, at the same time, the right to a fair, timely hearing is provided. Justice is a feature of mediation.²⁸

CONCLUSION

During the amicable dispute resolution process, the parties to the conflict are allowed to regulate the dispute and find the correct solution for the dispute resolution, which will strengthen the per-

sonal or business relationship between the parties in the future. Mediation is not only focused on the resolution of the dispute. One of the key functions of a mediator to successfully mediate business disputes is to focus on the interests of the parties and be able to separate them from the positions of the parties.²⁹ A mediator must be able to remove the emotional background in business relations and transform it into an interest-based mediation process. Also, the mediator should create an environment tailored to the clients and be able to identify the main goals. It is a fact that through a properly prepared, neutral third party (mediator), citizens and business representatives are allowed to end expensive civil disputes that have been going on for a long time in court by mutual agreement, quickly, in a short time and with satisfactory results for both parties.

Based on the above, implementing general mediation standards in national law is a big challenge. Standards on applying enforcement and refusal mechanisms in International business disputes are general, vague, and more evaluative. National Legislation should have standards regulating the evaluation of a “serious breach by the mediator of standards applicable to the mediator”. Also noteworthy, how will it be asserted that without a breach of standards by the mediator that party would not have entered into the settlement agreement? In my opinion, evaluation should consist of three steps: the evaluation of facts, the evaluation of the process of mediation from beginning to end as a whole process, and the assessment of the separated moments. This is necessary to ensure that no breach of standards by the mediator occurs before the parties enter into a settlement agreement.

The court has the right to refuse to grant a motion for recognition and enforcement of an international mediation settlement, if:

- Obligations stipulated by the international mediation settlement have been fulfilled or are not clear or understandable;
- Satisfaction of the request raised in the motion contradicts the terms of the international mediation settlement;
- There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that

27 Brady A. 2020. Mediation Developments in Civil and Commercial Matters within the European Union. “Arbitration: The International Journal of Arbitration, Mediation and Dispute Management”, 86(2), p. 390.

28 Batiashvili, I. (2022). The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), pp. 25-38.

29 *Ibid.*

party would not have entered into the settlement agreement.

As we can see, a breach should be "serious," which means that the Supreme Court should have the ability to evaluate and appreciate the severity of the violation. Also, It is doubtful if the regulation on refusal needs an additional general rule when rather rich normative standards for refusal on enforcement of mediation settlements exist.

Noteworthy that the ruling on the recognition and enforcement of the international mediation settlement is final and not subject to appeal.³⁰ This is beneficial from the view of business entities. It

reserves the time, the financial resources, the image of business entities and relations and also plays as a guarantee of not entering the same river after a while.

A party may live in another country, and the benefit or business share (digital asset) inherited from the blockchain may be in a completely different territory, internet space, and from different tech companies. In this hypothetical reality, introducing international mediation will be an effective mechanism.

We can assume that international mediation can be an alternative to legal action in court to settle disagreements and avoid escalations.

In conclusion, mediation is the often-missed effective opportunity!

30 Parliament of Georgia, Civil Procedural Code of Georgia, N1106, 14/11/1997, Seventh Section (9), Chapter XLIV16, Article 363⁴⁴. Decision on recognition and enforcement of international mediation settlement.

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